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CROWELL v. BENSON: JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS OF QUESTIONS OF "CONSTITUTIONAL FACT"

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Crowell v. Benson, decided by the United States Supreme Court, on February 23, 1932,[1] raises anew and in acute form the doctrine of "jurisdictional fact", which from time to time troubles the course of decision on judicial review of administrative determinations.

I

The case grew out of a proceeding for compensation under the Federal Longshoremen's and Harbor Workers' Compensation Act.[2] The defendant had brought the compensation proceeding against the petitioner, alleging among other things that he had been injured while in the petitioner's employ and while performing services on the navigable waters of the United States. The petitioner's answer denied that the relation of employer and employee existed between himself and the defendant. Under the administrative procedure provided by the Act there was a hearing and evidence presented before a deputy commissioner of the Federal Employees' Compensation Commission, who made a finding that the injury had occurred in the course of employment and awarded compensation. Thereupon the petitioner brought the present bill for an injunction in the federal district court under section 21 (b) of the Act, which provides that "if not in accordance with law a compensation order may be suspended or set aside in whole or in part through injunction proceedings . . . instituted in the Federal district

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[1] 52 Sup. Ct. 285 (1932).

[2] Act of March 4, 1927, c. 509, 44 STAT. 1424, 33 U. S. C. A. § 901 (1928).

court." The ground of attack on the award was that it was contrary to law because the applicant was not in fact at the time of the injury in the petitioner's employ and his claim was therefore, as a matter of law, not "within the jurisdiction" of the deputy commissioner. The fact of employment was thus made the decisive issue. The district court declined to decide this issue on the record of the testimony in the administrative proceeding, or even to consider that record, but held that it must be determined on wholly new evidence presented in court, since the statute would be unconstitutional unless construed to provide for such a judicial hearing *de novo*.[3] The case having been heard on the new evidence, the court found, contrary to the administrative finding, that the applicant at the time of the injury was not in fact in the petitioner's employ and therefore enjoined enforcement of the award.[4] This decree was affirmed first by the Circuit Court of Appeals,[5] and now by the Supreme Court in an elaborate opinion by Mr. Chief Justice Hughes. Mr. Justice Brandeis filed a persuasive dissenting opinion, in which Mr. Justice Stone and Mr. Justice Roberts concurred.[6]

As pointed out in the dissenting opinion, the issue on the appeal turned on a single question:

> "Upon what record shall the district court's review of the order of the deputy commissioner be based? The courts below held that the respondent [in the administrative proceeding,—*i. e.*, the petitioner in the injunction proceeding] was entitled to a trial *de novo;* that all the evidence introduced before the deputy commissioner should go for naught; and that the respondent should have the privilege of presenting new, and even entirely different, evidence in the district court. Unless that holding was correct, the judgment below obviously cannot be affirmed." [7]

The statute itself gives no express light as to the decision of issues of fact in injunction proceedings under section 21 (b), nor any light as to the record on which such issues are to be determined.[8] The Supreme Court's decision that the district court was entitled to disregard the testimony taken in the administrative proceeding on the fact of employment, and not merely make its own finding but base that finding on entirely new evidence, is put in the majority opinion on the ground that if the statute were not construed to require such procedure doubt would be cast on its constitutionality, and a statute is to be so construed as not to raise such doubt. The decision therefore turns on whether or not the respondent in a workmen's compensation proceed-

[3] 33 F. (2d) 137 (S. D. Ala. 1929).
[4] 38 F. (2d) 306 (S. D. Ala. 1930).
[5] 45 F. (2d) 66 (C. C. A. 5th, 1930).
[6] At the time of the decision the court consisted of only eight justices, Mr. Justice Holmes having resigned and Mr. Justice Cardozo having not yet become a member of the court.
[7] At 298.
[8] The section contemplates review only of the question whether the compensation order is "in accordance with law".

ing is entitled as a matter of constitutional right to have the fact of the claimant's employment determined on evidence presented in court in disregard not merely of the administrative finding but also of the evidence on which the administrative tribunal acted. The opinion states definitely that he is so entitled in proceedings under the Longshoremen's Act. Nothing is, of course, decided as to other fact-issues than that of employment, or as to proceedings under state workmen's compensation acts as distinguished from the Federal act. The case, however, raises important questions because of the possible effect of the Court's reasoning in connection with these broader issues not controlled by the decision. The reasoning of the majority therefore invites analysis.

The basic premise of the opinion is that

> "The act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting 'from an injury occurring upon the navigable waters of the United States' . . . and it applies only when the relation of master and servant exists." [9]

The reason why the limitation to injuries occurring on the navigable waters of the United States is "fundamental" is stated to be because Congress has no constitutional power to legislate concerning personal injuries except in the exercise of an expressly granted power, like the commerce power or the admiralty power. In the Longshoremen's Act, it has limited itself to action under the admiralty power, which extends only over navigable waters.

The reason for singling out as likewise "fundamental" the limitation of the Act to cases "where the relation of master and servant exists" is not so clear. The Court says:

> ". . . it cannot be maintained that Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations. It is unnecessary to consider what circumstances or relations might permit the establishment of such a liability by amendment of the maritime law, but it is manifest that some suitable selection would be required. In the present instance Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates." [10]

[9] At 287.
[10] At 294.

Apparently the thought of the Court is directed to the "due process" requirement of the Fifth Amendment.[11] The reasoning in the passage just quoted seems to rest at least in part on an assumption that while due process is not violated by the imposition of absolute liability on an employer in favor of one who stands to him in the relation of an employee, it would be so violated if absolute liability were imposed in favor of one not in fact standing in such a relation.[12] The Court thus assumes that the constitutionality of an application of the statute in any particular case depends on the fact-question of whether or not in that case the employer-employee relation actually exists. If it does not exist, then an award of compensation would violate the constitutional rights of the person against whom the award is made, since it would impose absolute liability in the absence of a condition necessary to justify it.

On the basis of this assumption the Court goes on to consider how and by what agency the determination of the "pivotal" fact of employment is to be made. The position reached is that since the presence or absence of this fact is something on which the constitutionality of the application of the statute depends, and something which is therefore determinative of the constitutional rights of the individual affected, the power to determine the fact can only be exercised by a court of law applying its independent judgment to evidence presented directly to it. This would seem to be the meaning of the following passage from the opinion:

> "In relation to these basic facts [*i. e.*, whether the injury occurred on the navigable waters of the United States and whether the employer-employee relation exists] the question is not the ordinary one as to the propriety of provisions for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether Congress may substitute for the constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion and there is no limitation of their use, and that Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its instrumentalities or in the executive department. That would be to sap the judicial power as it exists under

[11] See the fourth point of the dissenting opinion of Mr. Justice Brandeis, at 302.

[12] The language of the majority opinion does not expressly refer to the Fifth Amendment but to a supposed limitation on the power of Congress to amend the maritime law. However, as pointed out below, page 1081, it is difficult to see why Congress is under any other or greater limitation in amending the maritime law in this respect than that imposed by the due process clause.

the Federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." [13]

II

The logical cogency of the Court's reasoning is impressive. In substance, it evolves a new and more rigid doctrine of "constitutional fact" from reasoning analogous to that which in the past has supported the doctrine of "jurisdictional fact". The newer and narrower doctrine is but a projection of the older one, and can only be assessed against its background.

The "jurisdictional fact" doctrine is that where a statute purports to confer on an administrative agency a power to make decisions, but is construed as conferring that power only over, or with reference to, certain kinds of objects, situations or acts, then the fact-question of whether or not in any given case of such a decision the object, situation or act was, *in fact,* of the kind specified in the statute goes to the jurisdiction of the administrative agency to make the decision at all. It must therefore be determined independently in court, even though the determination of the fact in question had already been made, and was one which necessarily had to be made, by the administrative agency as an essential step in reaching its decision.[14] Thus, if a statute purports to confer on officials power to kill diseased animals [15] or confiscate "green" hides,[16] and the officials, purporting to act under the statute, have killed an animal or confiscated hides, on this doctrine the owner is entitled to try on independent evidence in court the question of whether the animal was, *in fact,* diseased, or the hides were, *in fact,* "green," although these were precisely the points on which the officials had to reach a determination as a preliminary to deciding whether or not to kill the animal or confiscate the hides.

This doctrine has the same logical appeal as the constitutional argument on which *Crowell v. Benson* rests. It holds that when statutory authority to decide depends on the actual existence of a fact, then the existence or nonexistence of that fact must be independently decided in court in order to enable the court to determine whether or not as a matter of law the administrative decision is *ultra vires* and void. What the doctrine means in practice is that unless, on those facts which are held to be "jurisdictional", the administrative tribunal reaches a finding corresponding to that which a court will later reach on different evidence, the administrative decision will be over-

[13] At 294.

[14] DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 309-310; Dickinson, *Administrative Law and the Fear of Bureaucracy* (1928) 14 A. B. A. J. 515; Dickinson, *Judicial Control of Official Discretion* (1928) 22 AM. POL. SC. REV. 293-294.

[15] Miller v. Horton, 152 Mass. 540, 26 N. E. 100 (1891).

[16] Warne v. Varley, 6 D. & E. 443 (1795).

thrown as in excess of jurisdiction. This consequence raises issues of a practical kind which are germane on the point of statutory construction.

The practical result of the doctrine of "jurisdictional fact" is to throw open for complete re-examination in court facts which, if they were not held to be "jurisdictional", would be concluded either by the decision of the administrative body or at least by the evidence at its disposal.[17] This doctrine has an obviously different incidence and value when applied to some types of administrative decisions and officers from what it has when applied to others. Thus, where an administrative decision of fact is of a kind reached by an official simply as a result of a rough-and-ready personal inspection preliminary to summary action, it does not stand on all fours, so far as concerns the weight to which it is entitled, with a decision made as a result of a formal administrative hearing protected by procedural safeguards. A decision of fact made by a dairy or meat inspector as a preliminary to summary destruction of food is clearly not on the same footing with a decision of the Interstate Commerce Commission. For the former type of decision the doctrine of "jurisdictional fact" supplies in some classes of cases a not unreasonable opportunity for correction; and it is significant that the doctrine grew up in connection with review of precisely these more or less summary official acts taken as the result of decisions not based on a formal hearing preserved in a record.[18] If a pure-food inspector looks at a side of beef hanging in a butcher-shop and decides to destroy it, it is perhaps not unfair to require that he should be able to prove by evidence in court that the meat was in fact unfit for consumption[19]; although certainly such a requirement that an official must act at his peril has a dangerously discouraging effect on the force and vigilance of administrative action.[20] The weight of author-

[17] See FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) 293. DICKINSON, *op. cit. supra note* 14, 320 *et seq.*

[18] The doctrine made its earliest appearance in Terry v. Huntington, Hardres 480 (1669), where excise officers seized as "strong waters" liquors which the owner claimed to be "low wines". *Cf.* Dickinson, *Judicial Control of Official Discretion, supra* note 14, at 291: "the reason for such a result (*i. e.* retrial of the facts), where review takes the form of a collateral action for damages against the official is largely historical. In the ordinary type of situation in which such damage suits grew up, the kind of administrative action involved was not quasi-judicial, nor were the officers supposed to be experts. An officer like a sheriff held no hearing and made no findings. The finding of facts was therefore necessarily the task of the jury in the review proceeding, if there was to be a finding of the facts at all. In consequence a re-examination in court of the facts on which the officials had acted came to be the rule." Speaking of Hutton v. City of Camden, 39 N. J. L. 122 (1876), which held that the issue of "nuisance or not" can only be determined in judicial proceedings and without respect to a prior administrative determination reached after a hearing, a commentator points out that such a decision is a natural result of "the condition existing prior to the growth of an administrative procedural law when determination by a court was conceived to be the only alternative to determination by an officer in any way he saw fit." Note (1931) 80 U. OF PA. L. REV. 96, at 102.

[19] North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101 (1908); Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854 (1891); Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942 (1904).

[20] See Note (1931) 80 U. OF PA. L. REV. 96, at 103, with its suggestion of keeping the alleged nuisance under quarantine until there is time for a hearing.

ity in these cases is therefore that the official will be held to have acted lawfully if he merely acted in good faith and without malice, irrespective of what the facts actually were.[21]

But where administrative action is not thus informal, summary and based on casual inspection, but consists in a formal decision rendered as the result of hearing testimony and argument which are preserved in a written record, the practical case against review of the administrative fact-determinations on new and independent evidence rests on stronger grounds. In such a case the administrative agency has already found it necessary to decide, and has decided, the fact-question in a substantially judicial manner, which accords to the party affected his right to a hearing. It is well settled that where there is provision for a proper administrative hearing, the individual affected is not entitled to another and second hearing in the review-proceeding at law.[22] Where the administrative proceeding takes the form of a formal judicial hearing, all needful protection to rights adversely affected is given by a review-proceeding in the nature of an appeal rather than a trial *de novo*.[23] On an appeal no one claims that the appellate tribunal should try the facts *de novo;* it limits itself to considering whether the tribunal of first instance committed error of law, including the question of whether it reached conclusions of fact which could not have been reached on the same evidence by reasonable men. The effect of an appeal is that on this ground, and this alone, a decision of fact will be reversed.

This is all the protection an individual is ordinarily accorded against the verdict of a jury or the findings of a master in chancery. Wherever it is attempted to give him, in the form of a trial *de novo,* wider protection against the decision of an administrative tribunal, the practical result is to undermine the effectiveness of the administrative action. When it is known that a case can be tried over again on new evidence before another tribunal. the proceeding in the tribunal of first instance becomes infected with more than an appearance of futility. This is true irrespective of whether the tribunal deals with large issues or small. It was true of the Interstate Commerce Commission in the days before the Hepburn amendments of 1906, when carriers against whom the Commission had made an order were entitled to a trial *de novo* in court of the fact-issues decided by the Commission. The delays and expense were so intolerable as to defeat com-

[21] 2 COOLEY, TORTS (3d ed. 1906) *797 et seq.;* BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW (1889) §§ 785-790. This result is reached by refusing to hold the facts jurisdictional. For cases in the administrative exercise of the police power see Raymond v. Fish, 51 Conn. 80 (1883); Forbes v. Board of Health, 28 Fla. 26, 9 So. 862 (1891); Seavy v. Preble, 64 Me. 120 (1874). See also Kennedy v. State Board of Health, 2 Pa. 366 (1845); Metropolitan Board v. Heister, 37 N. Y. 661 (1868); Van Wormser v. Mayer, 15 Wend. 262 (N. Y. 1836).

[22] DICKINSON, *op. cit. supra* note 14, at 106, n. 3. Note (1931) 80 U. OF PA. L. REV. 96, at 102-103.

[23] Dickinson, *Administrative Law and the Fear of Bureaucracy,* 600-601; *Judicial Control of Official Discretion,* at 290-291, 297-300, both *supra* note 14.

pletely the purpose of the statute.[24] No less intolerable results follow in the field of minor police regulation, where the stakes are small. Respect for administrative authority depends on its ability to get its decisions carried into effect, and carried into effect with reasonable promptness. Where a party provided with sufficient funds can prolong the procedure by trial *de novo* and torpedo the administrative determination by withholding his most telling evidence until the hearing in court, the result is not merely to deprive administrative procedure of its supposed advantage of speed, but to bring the administrative body into disrepute as ineffectual.

An additional result is to clog and encumber the courts with a mass of new business by requiring them to duplicate fact-finding work the performance of which is the administrative tribunal's reason for existence, and which, paradoxically, the courts would not be asked to perform if the administrative tribunal did not exist. A principal reason for the introduction of administrative procedure and the establishment of administrative tribunals with quasi-judicial power has been to make possible new types of supposedly desirable governmental activity which could not be carried on at all if the burden had to be borne by the already overcrowded courts. In view of the volume of this added business, the courts, to the extent that they are called on to retry on new evidence fact-issues previously decided by administrative tribunals, will inevitably have their dockets so clogged as to impede the performance not merely of the additional business, but of their own proper business of handling private litigation as well. This is particularly true in such a field as compensation awards under Workmen's Compensation Acts. Each year there are approximately 30,000 proceedings of this kind disposed of by administrative tribunals under the Longshoremen's Act alone.[25] In a single state like New York the number of claims filed under the state statute runs to half a million annually.[26] The principal object of the Workmen's Compensation system is to ensure through

[24] "The average duration of cases appealed was not less than four years. Sometimes they extended over twice that period. . . . The Georgia Railroad Commission cases were not settled for nine years. Nor did the tedious process end here. After the judicial review the entire question had to be remanded to the Commission for a new order in conformity with the findings of the court. After nine years of litigation in the Chattanooga case, back it went to the Commission to be retried. . . . Is it any wonder that the number of formal proceedings instituted by shippers dwindled steadily year by year? In 1901 only nineteen petitions were filed. . . . A second unsatisfactory feature of the relations of the Commission to the courts lay in the refusal of the latter to accept the evidence taken before the Commission in the original proceeding as final. . . . This of course involved a duplication of all expenses, which, in cases sufficiently important to appeal, were very heavy. . . . Both shipper and railroad therefore commonly came to regard the proceedings before the Commission as merely a necessary formality to be observed prior to the adjudication of the matter by the courts. This placed the Commission in a most awkward predicament. It was compelled to render a decision upon an entirely imperfect presentation of facts." RIPLEY, RAILROADS; RATES AND REGULATION (2d ed.) 460-462.

[25] Dissenting opinion of Mr. Justice Brandeis in Crowell v. Benson, at 309, 62 n.

[26] *Message of the Governor of the State of New York Transmitting Report of Commissioner Lindsay Rogers, appointed to examine and investigate the Administration of the Department of Labor*, STATE OF NEW YORK, LEGISLATIVE DOCUMENT (1929) No. 49, p. 14.

administrative procedure celerity of decision in a type of case where experience has led to the conclusion that delay and prolonged litigation are fraught with undesirable social consequences of a serious kind. It is, of course, possible to argue that the application of administrative rather than court procedure to the decision of cases of this character is, on an ultimate balancing of the issues, unsound, and violative of the rights of the employer. If this view is taken, however, the proper course would clearly be the abandonment of the administrative procedure altogether and a return to the old method of personal injury litigation in the courts, rather than wasteful duplication of effort by administrative agencies and courts alike.

III

The considerations so far advanced relate to the general policy of the retrial in court of fact-issues previously decided by administrative tribunals. No distinction has been made in what has been said between different kinds of facts. It may therefore be urged that while the arguments advanced are admittedly applicable against retrial of fact-issues in general, they do not meet specifically the problem of the special class of facts which are distinguished from others by being "jurisdictional". There is thus raised the question of what essential difference, if any, exists between "jurisdictional" facts and other facts.

It may be said at the outset that the question of whether or not a particular fact is to be treated as jurisdictional, or whether the doctrine of jurisdictional fact is to be applied at all, depends, so far as the issue we are now considering is concerned, entirely on the provisions of the statute from which the administrative tribunal derives its power.[27] If the legislature desires and intends to make the validity of an administrative determination turn on whether or not the existence of a particular fact shall be later proved to the satisfaction of a court, the court must give effect to the legislative intent and determine for itself in the review proceeding the existence of the fact. It might well be that in connection with certain types of summary administrative action, it would be sound policy for the legislature to set up such a requirement. Whether or not it would be is, however, solely for the legislature. There can be no doubt that where the legislature has rejected such a policy, and has expressed in the statute a clear intent to confer on administrative officials a power not merely to act on subject matter of a certain kind, but also to decide whether or not the subject matter acted on is of the kind specified, there is in general no obstacle, constitutional or otherwise, to prevent the courts from giving effect to such intent.[28]

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[27] Warne v. Varley, *supra* note 16. Kansas Home Insurance Co. v. Wilder, 43 Kan. 731, 23 Pac. 1061 (1890).

[28] Apart from the limitation which may be imposed by the decision in the principal case.

The cases where difficulty arises are where, as in most instances, the statute contains no express declaration of legislative intent one way or the other,—where it does not on its face expressly indicate whether or not a particular fact or any facts are to be treated as jurisdictional. If in this situation particular facts are singled out as "jurisdictional", this is due entirely to the courts themselves, nominally as a result of construing the statute, but ultimately of course as a result of applying their view of sound public policy.[29] Where a statute is silent in singling out facts as jurisdictional, a construction by the courts in favor of the jurisdictional-fact doctrine obviously suggests lack of sympathy with the administrative method of regulating the subject-matter dealt with. Where the courts are free either to adopt or reject an interpretation making certain facts jurisdictional, there is no reason to adopt such an interpretation unless consciously or unconsciously they disagree with the arguments against re-examining in court fact-issues already decided in the administrative proceedings. On the contrary, if they accept the validity of those arguments, there is nothing to prevent their holding that the administrative agency is itself empowered to decide whether or not the facts exist, instead of holding its power of decision limited to cases where the existence of the facts is proved to the court's own satisfaction. This was early recognized. In *Groenvelt v. Burwell*,[30] a college of physicians had by their charter authority to punish for malpractice, and found the plaintiff guilty and punished him. The plaintiff claimed that the jurisdiction of the college extended only over physicians who were in fact unskillful, and that the question of his skill or lack of it was therefore open to be proved in court. Lord Holt held, however, that the jurisdiction of the college extended not merely over physicians who were unskillful in fact, but rather over the question of the skillful or unskillful administration of physic; and therefore accepted the decision of the college on the fact of the plaintiff's skill as made within its jurisdiction. "A man convict by the defendants in pursuance of their jurisdictional authority cannot traverse the fact of which he is convict." This doctrine has become settled law as to the statutory authority of justices of the peace.[31]

[29] Seaman v. Patten, 2 Caines (N. Y. 1805) 312, where the court, in refusing to apply the jurisdictional fact doctrine, based its construction of the statute on grounds of policy: "When persons in a public capacity act in matters which require skill and experience and in which men may honestly differ in opinion, it seems cruel not to protect them when they conduct themselves with integrity, and without abusing their authority or manifesting any symptoms of malice."

[30] 1 Ld. Raym. 454 (Eng. 1691), also reported in 1 Salk. 263, and in 12 Mod. 386.

[31] Grove v. Van Duyn, 44 N. J. L. 654 (1883); Cave v. Mountain, 1 Man. & G. 257 (Eng. 1840). "A magistrate who commits a party in a case where he has not any jurisdiction is liable to an action of trespass; but if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation," 2 SELWYN, NISI PRIUS (7th Am. ed. 1857) 920, citing Cave v. Mountain, *supra;* Rex v. Bolton, 1 Q. B. 75.

The most illuminating cases are those which review administrative determinations by *certiorari*. Much of the history of jurisdictional fact is bound up with the *certiorari* cases. It was early settled that *certiorari* would issue out of the King's Bench to all inferior jurisdictions erected by Parliament "to see that they keep themselves within their jurisdiction; and if they exceed it, to restrain them." [32] This jurisdictional theory of review inevitably raised the question of jurisdictional facts, and of how the reviewing court was to determine their existence or non-existence. The courts did not hold in the *certiorari* cases that jurisdictional facts must be proved to their own satisfaction by independent evidence. They confined themselves to determining from the record of the proceedings in the inferior tribunal brought before them by the writ whether the jurisdictional facts had been sufficiently proved. Thus in an early New York case it was said: "Inferior magistrates, when required by writ of *certiorari* to return their proceedings, must show affirmatively that they had authority to act; and when their authority and jurisdiction depend upon a fact to be proved before themselves, and such fact is disputed, the magistrates *must certify the proofs in relation to it for the purpose of enabling the higher court to determine whether the fact be established.*" [33] It has come to be held in *certiorari* proceedings practically everywhere that the courts in determining the existence of a jurisdictional fact found by the lower tribunal to exist will limit themselves to examining the single question of whether or not on the evidence before that tribunal, as shown by the record, the existence of the fact could have been found by reasonable men. Thus in another New York case the court said: "May the court on a common law *certiorari* go beyond the inquiry whether the inferior tribunal had jurisdiction? . . . To hold that conclusions of fact upon conflicting evidence and matters of mere detail . . . and matters which are clearly submitted to the judgment and discretion of the inferior tribunal, when the evidence presents a case for its exercise, can be reviewed would . . . produce great inconvenience and embarrassment. It may be desirable not to multiply cases in which the appellate courts can be called upon to interfere in matters of small importance, but that furnishes no reason for denying the power to see that the rules of law are not violated. . . . I conclude therefore that *this court has power to examine the case upon the whole of the evidence to see whether as a matter of law there was any proof which could warrant a conviction of the relator.*" [34]

A classic statement is contained in the opinion in *State ex rel. Milwaukee Medical College v. Chittenden* [35]:

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[32] Rex. v. Inhabitants of Glamorganshire, 1 Ld. Raym. 480 (Eng. 1691).
[33] People *ex rel.* Bodine v. Goodwin, 5 N. Y. 568 (1851).
[34] People *ex rel.* Cook v. Board of Police, 39 N. Y. 506 (1868).
[35] 127 Wis. 468, 107 N. W. 500 (1906).

"We must take note of a difference between jurisdictional error as to a court proceeding according to the course of the common law and such error as to a mere tribunal exercising quasi-judicial authority. In the former, jurisdiction of the party and subject-matter being established, the determination cannot be successfully challenged for such error, though the basic questions of fact rest upon insufficient evidence, or have no foundation whatever therein. The judgment in such circumstances may be erroneous, but not reversible upon writ of *certiorari* for jurisdictional defect. In the latter, a clear violation of law in reaching a result within the power of the tribunal to reach, proceeding properly, is jurisdictional error. In the former, the evidence is not reviewable at all. In the latter, it may be reviewed, but only to the extent of determining whether there is evidence upon which the tribunal could reasonably and honestly have reached the conclusion which it did. The evidence cannot be weighed for the purpose of determining whether the same clearly preponderates against the decision. It may be looked into only to see whether there was competent evidence, sufficient in reason, to incline the mind efficiently to the conclusion reached. In the first, a conclusion without any credible evidence to support it, or any evidence at all, is mere judicial error. In the second, *want of credible evidence which, in case of the verdict of a jury would be sufficient upon appeal to require a reversal, is jurisdictional error*—error committed outside of jurisdiction, instead of in the exercise of jurisdiction, where the writ takes hold, performing its function of returning the tribunal to its proper sphere of action."

This rule has come to be generally applied under state workmen's compensation statutes, which usually provide for review of the administrative determination by *certiorari* or the analogous "writ of review." Statements of it are found in *Employers' Insurance Corporation v. Industrial Accident Commission*,[36] "An award made by the Commission is subject to review and *annullment where the finding on any jurisdictional fact is without the support of substantial evidence,* and this notwithstanding the provision of the act that the findings of the Commission on questions of fact shall be conclusive and final"; and in *Western Indemnity Co. v. Pillsbury*,[37] *"The power of review extends to the inquiry whether a finding of a jurisdictional fact is wholly without the support of any substantial evidence.* . . . The court may, under a writ of *certiorari,* inquire into the sufficiency of the evidence to sustain findings of the jurisdictional facts underlying the power of the commission to award compensation."

The *certiorari* cases thus indicate that even where the doctrine of jurisdictional fact is accepted, it need not be held to require the courts to determine for themselves the existence of the jurisdictional fact on evidence independently presented to them. Instead they reach their determination on

[36] 170 Cal. 800, 151 Pac. 423 (1926).
[37] 170 Cal. 686, 151 Pac. 398 (1926).

the evidence presented before the tribunal whose jurisdiction is in issue. They limit their review still more narrowly,—not only do they accept the evidence before the administrative tribunal, they do not undertake to apply their independent judgment to determine whether or not on that evidence they would have reached the same conclusion as the administrative body. They accept the jurisdictional fact as established if the administrative decision that it did in fact exist could have been reached by reasonable men on the evidence presented in the administrative proceeding.

This result is the natural outcome of a class of cases like the *certiorari* decisions where the proceeding in the inferior tribunal is preserved in a record which is available for the reviewing court to inspect for error. It is not a result which could be reached in cases of summary action where no administrative record is preserved, and where in consequence review cannot be had by appellate procedure, but only by way of collateral attack. It is probably not recognized how much the fact that review took the form of a collateral damage suit before a jury had to do with building up the doctrine that jurisdictional facts must be proved by evidence given in court.[38] Where the review proceeding is not collateral but is substantially appellate, as in proceedings by *certiorari* or statutory injunction, the opportunity of the reviewing court to correct errors of fact by an examination of the record renders an independent retrial of the facts not merely wasteful but unnecessary, whether the facts are jurisdictional or not.

IV

The doctrine of constitutional fact as developed in *Crowell v. Benson* applies to constitutional limitations on administrative jurisdiction the same reasoning which the doctrine of jurisdictional fact applies to statutory limitations. Just as a statute may confine jurisdiction to cases where a certain fact exists, so the constitution may be construed to limit jurisdiction to the presence or absence of a fact-situation.

The process by which the limits of constitutional authority have come to be made more and more to depend on proof of facts has gone forward so gradually that only recently has it attracted attention.[39] It is probably not too much to say that such a yard-stick of constitutional power would have been abhorrent to Marshall and his contemporaries. For them authority in a governmental organ existed or did not exist. Its existence depended on the interpretation placed by the courts on the words of a written instrument in the form of a general rule; and if it existed, it existed to the limit, irrespective of the mode of its exercise. Questions of constitutional power

[38] See *supra* note 18.

[39] Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action* (1924) 38 HARV. L. REV. 6.

began to depend on facts when the courts in applying certain of the broader limitations of the constitution commenced to take the position that the test of the existence of constitutional power might be the reasonableness of its exercise.[40] Reasonableness depends obviously on the facts; and so courts began to decide fact-questions in order to determine whether or not this or that governmental organ has exceeded its constitutional authority.

During the greater part of our constitutional history a question of constitutionality has been in the normal case a question of the validity of a statute,—a question as to the constitutional power of a legislative body to enact a general rule of law in the abstract. Where executive or administrative action has been questioned on constitutional grounds it has been usually because the action has been taken under a statute the constitutionality of which is challenged. The constitutionality of a statute in the abstract may depend on fact-issues, as where the test is one of reasonableness under the "due process" clause. Thus whether or not a particular exercise of the police power is constitutional, *e. g.*, a requirement that loaves of bread publicly offered for sale shall be of a certain size and weight, depends on a multitude of facts as to the art and practice of bread-making, chemistry, weather conditions, etc.[41] Similarly a legislative requirement that motor oil publicly sold shall conform to certain technical standards prescribed by the Bureau of Mines depends for its constitutionality on the whole body of facts essential for forming an intelligent opinion as to the reasonableness of the conclusions of the Bureau of Mines.[42] Where facts are thus relevant on the question of the reasonableness of a statute in the abstract, the courts have hardly as yet worked out any consistent or effective technique for bringing such facts to their knowledge.[43] To a great extent they still rely on judicial notice, although the practice is apparently increasing of admitting direct evidence in the trial court on facts bearing on the constitutionality of a statute sought to be applied in the case.[44]

Meanwhile the question of dealing with or passing on "constitutional facts" has emerged in a new phase. The doctrine that the existence of legislative power depends at certain frontiers on the reasonableness of its exercise has led to the doctrine, now well established, that the same statute may be constitutional or unconstitutional according as it is sought to be applied in different concrete situations,—in other words that its constitutionality

[40] The difference in attitude is illustrated on the one hand by Marshall's dictum that "the power to tax is the power to destroy", and on the other hand Mr. Justice Holmes' statement that "the power to tax is not the power to destroy while this court sits". Mr. Biklé has, however, pointed out in the article above cited that some of Marshall's most important constitutional decisions rest on ultimate judgments of fact.

[41] Burns Bakery Co. v. Bryan, 264 U. S. 504, 44 Sup. Ct. 412 (1924).

[42] Atlantic Refining Co. v. Trumbull, 43 F. (2d) 154 (D. Conn. 1930).

[43] Biklé, *op. cit. supra* note 39.

[44] Such evidence was introduced for example in Atlantic Refining Co. v. Trumbull, *supra* note 42. See Biklé, *op. cit. supra* note 39, at 14 *et seq.*

will depend on the facts of the case to which it is sought to be applied.[45] This doctrine imposes on courts which have to decide the issue of constitutionality a new type of duty in connection with that issue. Here it is not a matter of reaching fact-conclusions as to a general body of circumstances which might establish the reasonableness of the statute in the abstract,—what the court must do as part of deciding the issue of constitutionality is to reach conclusions on the facts of the actual case at bar.

Perhaps the most conspicuous instance in which the facts of particular cases provide the test of constitutionality is in the application of the Federal Employers' Liability Act.[46] It was held at the outset that the Act can validly apply only to injuries which occur in the course of interstate commerce [47] and it is therefore a constitutional question in every case whether the facts of the plaintiff's employment at the time of the injury amount constitutionally to interstate commerce. In order to decide this question it is of course necessary to determine first what the nature of the employment was,—in other words to determine the facts as a step toward drawing the conclusion on which the determination of the constitutional issue depends.

The cases are legion in which the right to recover has turned on whether the facts of the employment at the time of the injury constituted interstate commerce or not. In none has the Supreme Court given special attention to the way in which these questions of constitutional fact are to be proved, or to the process by which conclusions as to them are to be reached. This is doubtless because a large majority of such cases take the form of actions at law brought under the Federal Act in a lower federal or state court. The facts regarding the nature of the employment at the time of the injury are introduced in evidence at the trial along with the other pertinent facts relating to the injury, and this evidence forms the basis of a conclusion of law by the trial court that the injury did or did not occur in interstate commerce. When the case comes afterwards on appeal to the Supreme Court, the latter exercises its independent judgment to draw from the record a conclusion of the presence or absence of interstate commerce. This is not necessarily the same thing as determining what the facts themselves are, as would have to be done, for example, if there was conflicting evidence on whether the injured employee was working at the time of the injury on a car then in use in interstate commerce, or on cars used exclusively in intrastate commerce. There is ordinarily no clear separation between the function of

[45] This result is reached on the theory that the statute must be construed as providing expressly for its application to precisely the facts to which it is sought to be applied,—in other words as taking up into itself the concrete details of the facts of the case. Thus Mr. Justice Sutherland has said: "The case must be considered as though the statute had in specific terms provided for liability upon the precise facts recited." Cudahy Co. v. Parramore, 263 U. S. 418 at 422, 44 Sup. Ct. 153 (1923).

[46] Act of April 22, 1908, 35 STAT. 65, 45 U. S. C. A. 51 (1928). See FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) 206 *et seq.*

[47] First Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141 (1908).

drawing a pure fact-conclusion like this from the evidence and the function of drawing from the facts once established the conclusion of whether or not the employment was interstate commerce. This is because there is ordinarily no separate finding in the lower court on the fact-question as distinct from the legal conclusion as to the nature of the commerce. When, therefore, a case comes to the Supreme Court on appeal it has only the record before it and apparently reaches its own conclusion as to what the facts were as a more or less unconscious step in the process of deciding whether or not they sum up into interstate commerce. The distinction has not been pressing since in the majority of cases there is no controversy as to the facts about the employment, the sole issue being as to its character as interstate or intrastate commerce. However in one case a separate finding on the facts was made below in the form of a special verdict. The Supreme Court said that if the evidence was conflicting it could not go behind the findings embodied in this verdict, but if, on the contrary, the uncontradicted evidence affirmatively established facts which amount to interstate commerce then "neither the special findings nor the general verdict will preclude us from so holding." [48] In other words on a conflict in the evidence, the court which decides the constitutional question will be bound by the conclusions reached by the triers of fact below if these are pure conclusions of fact, even as to facts pertinent to constitutionality, but it may examine the evidence to determine whether there is a conflict.

Occasionally a case turning on whether or not the facts establish employment in interstate commerce originates as a state workmen's compensation proceeding, in which the employer claims that the state law does not apply to him because of the interstate-commerce character of the occupation at the time of the injury. Here the finding of facts as to the nature of the employment is made in the first instance by the compensation officials on testimony presented in the administrative proceeding. The case then goes by *certiorari* or statutory appeal to the state courts and from the latter to the United States Supreme Court. In practically all such cases the Supreme Court has hitherto been content to accept the findings of fact of the state administrative body as the basis for its independent conclusion as to whether on the facts so found the employment was in interstate commerce. Thus in *New York Central R. R. Co. v. Porter*,[49] the Court simply said "the evidence showed, and the State Workmen's Compensation Commission found" such and such facts, and went on to draw from these its conclusion as to the nature of the commerce. Again, speaking of the findings of a compensation board in another case the Supreme Court said, "the facts as found we may assume

[48] Baltimore & O. S. W. R. R. v. Burtch, Adm'x, 263 U. S. 540 at 543, 44 Sup. Ct. 165 (1924).

[49] 249 U. S. 168, 39 Sup. Ct. 188 (1919).

to exist,—facts, however, disassociated from the legal deductions from them. . . . We are brought therefore to a consideration of the soundness and determining quality of the legal propositions." [50]

Other classes of cases in which the constitutionality of the application of a statute has been held to turn on the facts of the case to which the statute is sought to be applied have been evolved from the due process clause. Thus it has been held that a state workmen's compensation act may not consistently with the constitutional requirement of due process be applied against an employer for an injury which did not in fact arise out of the employment. This apparently means that in every case decided under state workmen's compensation procedure [51] the employer is entitled to go to the Supreme Court under the Fourteenth Amendment on the issue of whether or not the injury in the particular case occurred in fact as a result of the employment. Here again we have another type of case where the fact-issues are in the first instance determined by a state administrative body. From the facts so determined the administrative body draws the conclusion of whether or not the injury resulted from the employment. On this issue the Supreme Court on appeal will reach its independent conclusion.[52] In the few cases to date there has been no dispute as to the facts and the courts have reached their conclusion on the basis of the findings of the administrative tribunal and on the record made before it.[53]

Another class of cases in which constitutionality turns on the facts of each case are those which deal with the validity of "train-stop-orders" made by state commissions. The courts have held that the validity of such an order depends on its reasonableness, which in turn depends on whether or not the station enjoys adequate service apart from the interstate trains ordered to stop.[54] In such cases the practice seems to be for the court in passing on the constitutional issue to reach its independent judgment as to the adequacy of the service, although in some of the more recent cases where the action of the commission has been reversed it seems to have been on the ground that there was no reasonable support in the evidence for the order.[55] Of course in cases of this type the facts to which the court applies its independent judgment to reach a conclusion of adequate service are the facts embodied in the testimony before the commission.

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[50] Philadelphia & Reading Ry. v. Di Donato, 256 U. S. 327, 41 Sup. Ct. 516 (1920). See also Philadelphia & Reading Ry. v. Hancock, 264 Pa. 220, 107 Atl. 735 (1919), *rev'd* 253 U. S. 284, 40 Sup. Ct. 512 (1919); Philadelphia & Reading Ry. v. Polk, 256 U. S. 332, 41 Sup. Ct. 618 (1921).

[51] At least where the statute is compulsory as distinguished from elective. For the distinction see Booth-Fisher Co. v. Industrial Comm., 271 W. S. 208, 46 Sup. Ct. 491 (1926).

[52] Cudahy Packing Co. v. Parramore, *supra* note 45.

[53] Bountiful Brick Co. v. Industrial Commission, 68 Utah 600, 251 Pac. 255 (1926), *aff'd* 276 U. S. 154, 48 Sup. Ct. 221 (1928).

[54] Biklé, *op. cit. supra* note 39, at 10, 13 n.

[55] Mississippi Railroad Commission v. Mobile & Ohio R. R., 244 U. S. 388, 37 Sup. Ct. 602 (1917). See DICKINSON, *op. cit. supra* note 14, at 324-325.

From some points of view the most important of all types of cases in which constitutionality depends on the facts of the case are the valuation cases in the field of public-utility regulation. The fact-issue of the fair value of the property is decisive on the constitutionality of every rate order. In 1920 the Supreme Court held in the *Ben Avon* case [56] that the utility affected by the order is entitled to have this fact-question decided by the independent judgment of the court in which the constitutional issue is raised, and that a finding of value made by a state administrative body as a result of its hearings may not constitutionally be accepted, although within the bounds of reason on conflicting evidence, as conclusive by the courts. Here, again, however, the facts to which the independent judgment of the courts is to be applied to reach their conclusion of constitutional value are the facts in the record before the administrative tribunal.

The sum and substance of the different groups of cases which make constitutionality depend on conclusions as to the facts of the particular case is that courts which are called on to decide the constitutional point must reach their independent conclusion from the evidence either as to the facts themselves, or at least as to the intermediate "mixed question of law and fact", such as whether or not the facts sum up into a conclusion of "interstate commerce", or "value", or "adequacy of service", or "employment", on which constitutionality immediately turns. Not merely does the multiplication of such cases open the door for types of litigation to get into the federal courts and ultimately to the Supreme Court which could not otherwise find their way there, but the practical result is that by raising the constitutional point a litigant is enabled to transfer to the courts the task of reaching their own conclusions on issues which would otherwise be determined finally by the findings of the body which heard the evidence, supposing always that those findings are within the bounds of reason.

V

The doctrine of constitutional fact is the doctrine of jurisdictional fact in a special form. Constitutionality is a question of power to act, and when it is held to depend on the presence of a fact, the situation is the same as when what is called the "jurisdiction" of an administrative body is made to turn on a fact-issue. The difference is only that in one case the limitation is deduced from the Constitution and in the other from the statute creating the body whose power is in issue. It is accordingly of interest to compare the direction which the law is taking on review of constitutional fact-issues with that which it has taken on jurisdictional fact.

Prior to *Crowell v. Benson* there had not been raised with regard to constitutional facts the question of whether or not they must be decided on

[56] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527 (1920).

fresh evidence presented in the court which passes on the constitutional issue.[57] Hitherto, the question has been whether or not the ultimate conclusion as to such facts must be drawn by the independent judgment of the reviewing court unfettered by a presumption in favor of the conclusion of the fact-finding body. The affirmative answer to this question, given for the first time decisively in the *Ben Avon* case, breaks sharply with the decisions on jurisdictional fact in the *certiorari* cases. Although this matter of the court's independent judgment is not raised in *Crowell v. Benson,* it is nevertheless the fundamental issue underlying the decision there. Had that point not been decided as it was in the *Ben Avon* case, there would have been no occasion for the special point of *Crowell v. Benson* to arise. It may therefore be suggested that, apart from considerations of policy already stated, there seems no sufficient reason for a different rule in the *certiorari* cases and the *Ben Avon* case. The mere fact that in one the limitation on power is established by statute and in the other is deduced from the Constitution should, if pertinent at all, favor the opposite result. In both instances, a court is called on to say whether or not a governmental organ has overstepped the limits of its authority, and to do so must say whether or not a certain fact existed. In the *certiorari* cases, the courts take the position that they will say the fact existed if the administrative body reached the conclusion that it did and cannot be shown to have acted beyond the bounds of reason on the evidence before it. In the *Ben Avon* case, the rule is laid down that the court must say whether the fact existed in its own opinion. It seems more difficult to sustain the latter result where the limitation is spun from vague phraseology of the Constitution than where it is imposed by statute creating the governmental organ. The constitutional limitation sought to be enforced is merely the requirement of reasonable action.[58] It would therefore seem that one whose rights are affected should be entitled to no more than that the governmental agency should act within the bounds of reason and not necessarily as the reviewing court would act on its own view of the facts. It has always been axiomatic that there is a presumption in favor of constitutionality. If the presumption holds, governmental action should not

[57] Except in so far as the point was involved in the decision of Ng Fong Ho v. White, 259 U. S. 276, 42 Sup. Ct. 492 (1922). See *infra* note 65.

[58] It is not necessary to consider what result would be required if a definite and specific provision of the Constitution expressly limited the action of a certain governmental agency to the existence of an explicitly stated fact. The cases which we are considering involve at most a constitutional requirement of reasonable action. What the courts do is to deduce from the requirement of reasonableness a further requirement that a certain fact should be present and then build on this the additional requirement that the presence of the fact must be proved to the satisfaction of the courts. To approach the problem in this way obscures the consideration pointed out by Mr. Justice Brandeis in his dissenting opinion in Crowell v. Benson, that "the power of Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence of those circumstances." If Congress may provide for the determination of the existence of facts by a particular agency, it would seem sufficient to satisfy the requirement of reasonableness if the determination itself is a reasonable one.

be unconstitutional unless so unreasonable as to be arbitrary, and the litigant should be entitled to no more than that the courts should say whether or not the bounds of reason have been passed. To hold the action unconstitutional unless based on a finding identical with that which the reviewing court makes is in effect to reverse the presumption, and to impose on the governmental organ the burden of proving constitutionality affirmatively.[59] The effect of this doctrine is spreading to cases where the issue is as to the constitutionality of a statute in the abstract, and. as pointed out by Mr. Justice Brandeis in his dissent in the *Burns Bakery* case, the Court sometimes seems to take the position that a statute is unconstitutional unless in conformity with the Court's own view of legislative policy.

There can be little doubt that the rule of the *Ben Avon* case rests at bottom on unconscious acceptance of the particular brand of philosophy sometimes designated as "naïve realism". It rests on the assumption that the existence of a fact is something absolute and fixed, and capable of being apprehended rightly or wrongly, correctly or incorrectly. The legal authority of the administrative body is consequently regarded as depending on the *real* or *actual* presence of a fact, independently of anyone's correct or incorrect apprehension of it, or conclusion about it.[60] From this point of view, the reasonableness or lack of reasonableness of the administrative body's conclusion makes obviously no difference. It is assumed that the courts in passing on the question of power have access, in a way the administrative body does not have, to the fact itself, and not merely to a conclusion or opinion about it. Thus the governmental body's finding, which is mere conclusion or opinion, can be corrected by being checked against the absolute fact found by the court. This identification of the court's finding with the fact itself underlies all reasoning which insists that the reviewing court must reach its own independent conclusion as to jurisdictional facts. The problem takes on a different aspect if it is once recognized that the court's finding represents after all only the court's conclusion and is no more identical with the fact itself than is the administrative finding. On this view we can no longer hope to check the administrative body's conclusion against the very fact—the question is simply that of checking one body's conclusion against another's. If it is thus understood that conclusion is merely being checked against conclusion, it should be enough for the reviewing tribunal to pass on whether the conclusion below was reasonable. A recognition of this underlies the

[59] See the discussion of the Ben Avon case in DICKINSON, *op. cit. supra* note 14, at 200 *et seq.* The cases reviewed in the same work at 176 *et seq.* indicate that prior to the decision in the Ben Avon case the Supreme Court was content to accept, and to hold that the lower federal courts might accept, conclusions of state administrative bodies, if within the bounds of reason, on issues going to constitutionality.

[60] This is noted by Mr. Justice Brandeis in his dissenting opinion in Crowell v. Benson, where he states that "The power of Congress to provide by legislation for liability under certain circumstances . . . does not depend upon the absolute existence in reality of any fact".

certiorari cases. That it has not been recognized in the "constitutional fact" cases is, no doubt, due in part to the kind of issues on which some of those cases turn.

Thus, for example, where the issue is whether the facts sum up into a conclusion of interstate commerce, the question seems to be one of defining "interstate commerce", and so wears the appearance of a question of constitutional interpretation for the court, although turning on the facts of each case. What it is logical to assume of such a question as "interstate commerce" has been assumed by analogy of such other conclusions as "reasonableness", "value", "adequacy of service", "injuries arising out of the employment" and the like, which are also treated as questions of constitutional interpretation, and, therefore, for the exclusive determination of the court, when forming a link toward an ultimate conclusion of constitutionality. Now conclusions of the latter kind are precisely those which, under the name of "conclusions on mixed questions of law and fact", are left in ordinary litigation to be drawn from the evidence by the triers of fact without interference by the reviewing court unless (*a*) beyond the bounds of reason on the evidence, or (*b*) at variance with some general rule which the court chooses to lay down as one of law.[61] If it is well settled, as it is, that such "mixed" conclusions of the fact-finding body are to stand although embodying an element of law, it is hard to see why they should not stand merely because the element of law happens to be constitutional law. If, in other words, negligence in tort law is left to take its specific content in the ordinary case from the conclusions of the fact-finding body, it is hard to see why "adequacy of service" or "injury arising out of the employment" in constitutional law should not likewise take their content from the same source so long as within the bounds of reason on the evidence and not at variance with a legal rule. To require that such conclusions, because they go to constitutionality, must be drawn from the evidence by the courts themselves, is in effect to make every constitutional case nothing but a jury case with the court acting as jury. Such a result tends to destroy the value of precedents and invites every case into court, and ultimately into the Supreme Court, on its facts. Obviously, however, there is no time for the Supreme Court to decide more than a relatively small proportion of all such cases that may arise, with the result that its action takes the form of sporadic and uncertain interference, leaving behind a train of decisions which, being only decisions on facts, have small value or no value as guides in future cases.[62] This is, however, the result toward which the recent decisions have been tending.

Even assuming, however, that conclusions of fact, or on mixed questions of law and fact, when going to constitutionality, must be drawn by the courts, it has hitherto been taken for granted by the Supreme Court in all

[61] DICKINSON, *op. cit. supra* note 14, at 168-170, 313-319; Bohlen, *Mixed Questions of Law and Fact* (1923) 72 U. OF PA. L. REV. 111 *et seq.*

[62] See FRANKFURTER AND LANDIS, *op. cit. supra* note 46, at 206-208.

the groups of cases above discussed that such conclusions are to be drawn from the record made before the body whose determination is under review. Thus in determining whether a state workmen's compensation award has been made to a claimant who at the time of the injury was engaged in interstate commerce, the Supreme Court has drawn its conclusion as to the nature of the employment from the testimony before the compensation officials. Similarly, in deciding whether or not an injury for which a compensation award was made arose out of the employment, the Supreme Court has reached its conclusion on the administrative testimony. Again, in determining whether or not the value of utility property used as the basis for a rate order was the constitutional fair value of the property, the Supreme Court has reached its judgment of fact from the record before the utility commission. There has never been any suggestion that in order to reach an independent conclusion on questions which go to constitutionality the Supreme Court must have before it testimony taken in a court of law instead of that taken before the administrative body.

If the Supreme Court has been thus willing to reach its conclusions on issues of constitutional fact from an administrative record, it would be inconsistent to hold that inferior courts, federal or state, cannot do likewise, and to require such courts to determine constitutional facts only from an independent record made in a hearing *de novo* before them. No such requirement has ever been imposed. The Supreme Court has accepted without question, and has itself acted under procedure which allows no opportunity for trial *de novo* of constitutional facts and leaves no opening for the courts to determine those facts except on an administrative record. This has been true in practically all the types of cases reviewed above. Thus in the workmen's compensation cases which raise the constitutional issue of "interstate commerce" and "injuries arising out of the employment" the state procedure gave no opportunity to take other testimony on those issues than that presented before the board. Similarly, in the train-stop and valuation cases, the state procedure does not ordinarily provide for trial *de novo* on the facts. Nevertheless, the Supreme Court has taken jurisdiction of the constitutional issue in these cases on appeal without raising any question of an improper record. In *Booth-Fisher Company v. Industrial Commission*,[63] it was held that a compulsory workmen's compensation act would be unconstitutional if it did not permit the reviewing court to reach its independent conclusion as to whether or not the injury was in fact wilfully self-inflicted; but there was no suggestion whatever that the conclusion must be reached on fresh evidence in a trial *de novo*.

It seems therefore clear on the precedents that even where courts must reach their independent conclusions on questions of constitutional fact, it has not hitherto been held that they must do so on the basis of an independent

[63] 271 U. S. 208, 46 Sup. Ct. 491 (1926).

record made in court. In fact, in the *Ju Toy* case,[64] there was a square holding that a person prevented from entering the country by immigration officials after an administrative hearing was not entitled to a trial *de novo* in court of the highly important fact of citizenship on which the constitutional right of the officials to act at all depended.[65] *Crowell v. Benson* now holds that there must be a court trial *de novo* on a particular type of constitutional fact in a particular type of proceeding. The important practical question is whether the decision is to be interpreted as establishing the broad implications of its reasoning; or, if not, what is the test of the kind of fact and the kind of proceeding to which the doctrine of the case is limited.

VI

It would be not merely inconvenient and burdensome to the courts, but altogether disruptive of administrative processes, to hold that every fact-issue on which a claim of constitutional right can be made to depend becomes thereby entitled to a retrial on new evidence in a review proceeding at law. The reason is that under the broad interpretation now placed on the Fifth and Fourteenth Amendments there is practically no issue going to the substantial merits of a controversy which if "unreasonably" decided by an administrative tribunal cannot be made the basis of a claim of constitutional right. Consider for example, a proceeding before a utility commission or the Interstate Commerce Commission charging discrimination against a carrier. The administrative body finds that discrimination exists and orders a lowering of the rate. If there was "in fact" no discrimination, it is quite possible to argue that there is no reasonable justification for the lowering of the rate and the resulting "taking" of the utility's property. The basis is thus laid for a claim of constitutional right the determination of which depends on a conclusion as to the existence or non-existence of the fact of discrimination. It has hitherto been well settled that on review of an administrative finding of discrimination the utility is not entitled even to the independent judgment

[64] United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644 (1905).

[65] However, in Ng Fong Ho v. White, *supra* note 57, an "expulsion" as distinguished from an "exclusion" case (see VAN VLECK, ADMINISTRATIVE CONTROL OF ALIENS (1932) 189) it was held, that the alien was entitled to court retrial on new evidence of the fact of citizenship on the ground that it is "an essential jurisdictional fact". There can be no doubt that the holding in this case paves the way for the decision in Crowell v. Benson. The decision can of course be put on the ground that Congress did not intend to commit to the immigration officials the determination of the fact of citizenship. If it is taken as a standing for the broader proposition that Congress cannot constitutionally commit the determination of that question to administrative officials, the question then arises as to what questions can, and what cannot, be constitutionally left to the determination of an administrative tribunal. If citizenship, because of the personal rights depending upon it, cannot constitutionally be left to the determination of an administrative tribunal, it is plausible to hold that such a question as constitutional fair value in rate cases, upon which large property interests depend, can in the same way not be left to their determination. However, if the problem is approached from the standpoint of this analysis, the ultimate result will be less unsatisfactory than to hold that all fact issues upon which a constitutional right depends must for that reason be decided on evidence presented in a law court.

of the reviewing court on the evidence.[66] It seems plain, however, that in the manner just described discrimination can, by the skill of the pleader, be converted into a constitutional issue which brings it within the doctrine of *Crowell v. Benson.*

Again, suppose an application for a building permit. The financial interest at stake in such applications is frequently far greater than is ever involved in a workmen's compensation proceeding. Suppose a permit refused because of a finding by the building inspector that the plans submitted do not sufficiently provide for safety of construction or protection against fire hazards. The owner can claim with a substantial show of reason that unless the finding of the inspector is "correct in fact" he is being deprived of his constitutional rights, thus requiring, if *Crowell v. Benson* is broadly applied, that the correctness of the finding shall be re-examined on new evidence in court. The cases are already moving in this direction so far as zoning orders and regulations are concerned, the Supreme Court having held that the reasonableness of a zoning order on the facts of the case constitutes a constitutional question under the Fourteenth Amendment on which the affected property owner is entitled to the independent conclusion of the courts.[67] It only remains on the basis thus laid to apply *Crowell v. Benson* and require that the court's finding of reasonableness must be drawn from independent testimony.

In the field of workmen's compensation awards it has already been decided, as we have seen, that whether or not the injury actually arose out of the employment in the particular case is a constitutional issue, which, if wrongly decided against an employer, deprives him of his constitutional rights. The same holding has been reached as to the issue of whether or not the injury to the employee was wilfully self-inflicted. If an employer is entitled, as in *Crowell v. Benson,* to a court trial *de novo* of the facts as to the employer-employee relationship because the question is one of constitutional fact, there seems no reason for denying him the right to a similar trial on the constitutional facts of whether the injury arose out of the employment or was wilfully self-inflicted.

Without multiplying examples it seems clear that substantially all issues of importance committed to the decision of administrative tribunals and which affect personal or property rights are thus capable of being translated into issues of constitutional fact. If the doctrine of *Crowell v. Benson* applies to constitutional issues merely because they are such, the result would be to subject all administrative determinations on points of material substance which affect personal and property rights to a retrial on new evidence in the

[66] See DICKINSON, *op. cit. supra* note 14, at 159-174.

[67] Nectow v. City of Cambridge, 277 U. S. 183, 48 Sup. Ct. 447 (1928). It is to be noted that in this case the determination of fact was made by the master in a federal equity proceeding on evidence presented directly to him, and not on evidence presented before the administrative body.

reviewing court. It is true that the doctrine need not logically be extended to administrative decisions which affect what are rather special privileges or favors bestowed by government than "fundamental" private rights. This would exempt from the operation of the rule, as the majority opinion expressly points out, the determinations of certain administrative agencies "which have been created to aid in the performance of governmental functions, and where the mode of determination is within the control of Congress; as *e. g.*, in the proceedings of the Land Office pursuant to provisions for the disposition of public lands, of the authorities of the Post Office in relation to postal privileges, of the Bureau of Internal Revenue with respect to taxes, and of the Labor Department as to the admission and deportation of aliens." [68] It would, however, leave within the scope of the rule all administrative agencies whose function is to exercise regulatory authority under the police power or the power to regulate public callings. The distinct impression left by the reasoning of the majority is that where determinations of fact made by such agencies are pertinent to a constitutional issue they must be subject to review on independent evidence in court to make the procedure constitutional.[69]

If the holding of the case should be taken to go so far as this it would, of course, effect nothing short of a revolution not merely in the precedents, but in the organization and procedure of the whole existing administrative system of police regulation, state as well as federal. If it is a requirement of due process that one whose rights have been adversely affected by an administrative determination on a question of constitutional fact must be entitled to a re-examination of the fact on new evidence in a law-court it would follow that all state procedure under the police power which does not provide an opportunity for such re-examination must be unconstitutional under the Fourteenth Amendment. Logically the reasoning and assumptions of the majority in *Crowell v. Benson* point towards this conclusion; but at the same time there are many expressions in the opinion which indicate that a less drastic and extensive result seems to be intended.

In the first place the decision is in part expressly rested on the judicial article of the Federal Constitution and on the doctrine of the separation of powers. The Court reaches its result partly on the theory that a different holding would unconstitutionally restrict the judicial power granted by the Article III to the federal courts through requiring them to reach a conclusion on a record made before another body. On this view the doctrine of the case would be limited to review proceedings in the federal courts and would not be applicable to state procedure at all, so that state statutes would still remain constitutional which do not provide for court retrial *de novo* of issues of constitutional fact. The Court says:

[68] At 295.
[69] At 292.

> "In this aspect of the question the irrelevancy of state statutes and citations from state courts as to the distribution of state powers is apparent. A state may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the federal constitution which are applicable to state authority." [70]

The proviso in the words just quoted leaves the door ominously open, however, to what may be held required of state procedure by "the essential demands of due process" in the light of the *Ben Avon* case.

Assuming that the decision is meant to be limited to review proceedings in the federal courts, the opinion suggests certain further limitations. Thus it is apparently not meant to apply to review of orders of the Interstate Commerce Commission, which seem excepted by the following language:

> "We have already noted the inappositeness to the present inquiry of decisions with respect to determinations of fact upon evidence and within the authority conferred, made by administrative agencies which have been created to aid in the performance of governmental functions, and where the mode of determination is within the control of Congress. . . . Similar considerations apply to decisions with respect to determinations of fact by boards and commissions created by Congress to assist it in its legislative process in governing various transactions subject to its authority, as for example, the rates and practices of interstate carriers, the legislature thus being able to apply its standards to a host of instances which it is impracticable to consider and legislate upon directly, and the action being none the less legislative because taken through a subordinate body." [71]

Here again, however, it must be noted that the court expressly limits its statement to "determinations of fact . . . within the authority conferred", which suggests that on an issue of whether or not the order is "within the authority conferred" the doctrine of *Crowell v. Benson* may well be held applicable.

Furthermore the majority opinion suggests that in workmen's compensation proceedings the doctrine of the case may be limited to the single fact-question of the existence of the employer-employee relation. The opinion expressly states that "finality may be regarded as extending to the administrative determination of the question of fact whether the injury was occasioned by the wilful intention of the employee to injure or kill himself." [72] No reason is suggested, however, why the fact of the employer-employee relation should be thus dealt with differently than other facts elsewhere held

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[70] At 295.
[71] At 295.
[72] At 291.

constitutional, as, for example, the question of whether the injury was wilfully self-inflicted has been held to be.[73]

Finally and most importantly there runs throughout the opinion a thread of connection between the result reached and the fact that the case involved the admiralty jurisdiction of the federal courts under Article III of the Constitution. Thus in holding that the statute would be unconstitutional if applied in a case where the employer-employee relation did not in fact exist, the opinion speaks of a want of power in Congress "to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations", such as, *e. g.,* the employer-employee relation.[74] It is difficult to see why Congress is under other or greater limitations in amending the maritime law than elsewhere in the scope of its legislative activity, since it is as firmly settled as any point can be that "the power of Congress to make such amendment is co-extensive with that law . . . it extends to all matters to which the maritime law extends." [75] So far as concerns the power of Congress, it would seem that inability to impose absolute liability in the absence of the employer-employee relation must be derived, if at all, from the due process clause rather than from any peculiar limitation on the power to amend the maritime law.

However, if the general tenor of the court's reasoning is not pressed to its logical conclusion, there is a special and more limited ground connected with the admiralty character of the proceeding on which it is possible to rest the decision so as to sterilize its otherwise revolutionary effect. This is the Court's holding that the review proceeding under section 21b of the Longshoreman's Act is a proceeding in admiralty.[76] It follows that the judicial power exercised in the review-proceeding is the admiralty power conferred on the federal courts by Article III of the Constitution. The ultimate holding of the case is therefore at least susceptible of being reduced to a proposition no broader than that where a federal court is exercising the admiralty power, Congress may not constitutionally cut this power down by requiring the court to reach conclusions of fact on a record made elsewhere. On this view the decision would not even apply, as above suggested, to all review proceedings in federal courts, as distinguished from state courts, but would be limited solely to instances where the federal courts sit as courts of admiralty. It is to be hoped that this construction of the holding of the case will be ultimately established, since even should the doctrine of the case be held inapplicable to state procedure, it would still be vastly disturbing if the

[73] See last three paragraphs of majority opinion.

[74] At 294.

[75] *Ex parte* Garnett, 141 W. S. 1. See also The Lottawanna, 21 Wall. 558 (1874); The Western Maid, 257 U. S. 419, 42 Sup. Ct. 159 (1922).

[76] At 292.

judicial power constitutionally granted to the federal courts were held to require them on all questions of constitutional fact coming before them to hold a trial *de novo*. It would, for example, inevitably undermine the effect of the settled precedents governing review of orders of the Interstate Commerce Commission and would make the establishment of an effective system of administrative regulation by the Federal government well-nigh impossible. Furthermore, it would reach out and affect state administrative procedure wherever the question of the constitutionality of a state administrative order under the federal constitution was raised in a federal court, thereby requiring the latter to decide a question of constitutional fact. There can be little doubt, for example, that it would make unconstitutional such a statute as that recently proposed, to do away with retrial of the facts before a federal master in injunction suits against the enforcement of state rate orders and orders of other state administrative bodies.[77] Such results involve questions of public policy of the gravest moment which should be faced squarely on the merits and not foreclosed collaterally through the decision of an inconsequential compensation claim under the Longshoremen's Act.

[77] Lockwood, Maw, and Rosenbury, *The Use of the Federal Injunction in Constitutional Litigation* (1930) 43 HARV. L. REV. 426 at 456.